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No. 06 - 972

In the
**Supreme Court of the United States**
October Term, 2006

JOHN M. GIOVANELLA,
*Petitioner,*
v.
TOWN OF ASHLAND CONSERVATION COMMISSION,
*Respondent.*

On Petition for Writ of *Certiorari*
to the Massachusetts Supreme Judicial Court

# BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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February 15, 2006

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# MOTION OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

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Pursuant to Supreme Court Rule 37.2, counsel for *Amicus Curiae* New England Legal Foundation ("NELF") have attempted to secure written consent for the filing of the attached *Amicus Curiae* Brief from counsel for the Petitioner and Respondent. Counsel for Petitioner granted such consent and its assent is on file with this Court. Counsel for *Amicus* requested assent from counsel for Respondent on February 9, 2007. By teleconference of February 12, 2007, Joseph M. Hamilton, Esq., counsel for Respondent stated that he would not be able to assent to the filing of the accompanying brief by *Amicus*. Accordingly, *Amicus Curiae* NELF hereby moves this Court for leave to file the Brief of *Amicus Curiae* which is submitted and bound herewith. *Amicus* make this motion on the following grounds:

NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations, primarily from New England.

NELF's members are affected by the real estate development climate in New England. Furthermore, some of NELF's members are directly interested in real estate development because they own, finance, develop, and manage real estate. A healthy climate for real estate investment and development is a mark of a vital and vibrant economy and depends on secure rights for property owners. For those reasons, NELF's members are concerned about the issues

presented this case.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* No. 06-484 (U.S. argument scheduled March 28, 2007); *Watters v. Wachovia Bank, N.A.,* No. 05-1342 (U.S. argued Nov. 29, 2006); *Rapanos v. United States,* 126 S. Ct. 2208 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Protection,* 126 S. Ct. 1843 (2006); *Kelo v. City of New London,* 125 S. Ct. 2655 (2005); *San Remo Hotel, L.P. v. City of San Francisco,* 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,* 544 U.S. 280 (2005); *Commissioner v. Banks,* 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council,* 530 U.S. 363 (2000). In addition, *Amicus* served as *amicus curiæ* in the court below. *Giovanella v. Conservation Commission of Ashland,* 447 Mass. 720, 857 N.E.2d 451 (2006).

*Amicus* believes that this case addresses a significant issue in regulatory takings analysis, the determination of the relevant parcel. Property owners and those involved in real estate development are concerned with this issue because legal analysis based on each separate buildable parcel affected by a land-use regulation, and not on all nearby property under common ownership, appropriately focuses regulatory review on the true cost of the regulation to the property owner and treats property investment fairly.

*Amicus Curiæ* therefore believes that this Brief provides an additional perspective, which may aid the Court in

determining whether to grant the petition for a writ of *certiorari* of the petitioner, John M. Giovanella ("Giovanella").

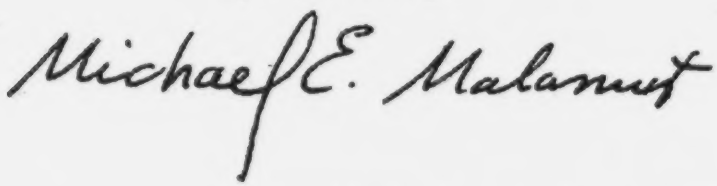
Further, pursuant to Supreme Court Rule 37.6, counsel for *Amicus* state that neither counsel for Petitioners nor counsel for Respondent authored the accompanying brief in whole or in part and no person or entity other than *Amicus* made a monetary contribution to the preparation or submission of the brief.

Wherefore, *Amicus* respectfully request that this Court grant NELF leave to file as *Amicus Curiæ* the attached brief in support of the Petition for a Writ of *Certiorari*.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION

By its attorneys,



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## QUESTION PRESENTED

*Amicus Curiæ* New England Legal Foundation ("NELF") adopts the statement of the question presented contained in the Petition of Petitioner John M. Giovanella ("Giovanella"), as follows:

1. Whether it is appropriate, in regulatory takings analysis, to combine a leally separate and independent economically viable lot with a previously developed lot, because the lots happen to be contiguous and owned by the same person, and to thereby defeat a claim that the government has taken one of the lots?

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# BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

## INTEREST OF *AMICUS CURIÆ*

*Amicus Curiæ* New England Legal Foundation ("NELF") seeks to bring to the Court's attention its views, and those of its supporters, concerning the scope of the takings clause under the Fifth and Fourteenth Amendments to the United States Constitution.[1]

NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of

1 Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* state that neither counsel for Petitioners nor counsel for Respondent authored this Brief in whole or in part and no person or entity other than *Amicus* made a monetary contribution to the preparation or submission of the brief.

promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations, primarily from New England.

NELF's members are affected by the real estate development climate in New England. Furthermore, some of NELF's members are directly interested in real estate development because they own, finance, develop, and manage real estate. A healthy climate for real estate investment and development is a mark of a vital and vibrant economy and depends on secure rights for property owners. For those reasons, NELF's members are concerned about the issues presented this case.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, No. 06-484 (U.S. argument scheduled March 28, 2007); *Watters v. Wachovia Bank, N.A.*, No. 05-1342 (U.S. argued Nov. 29, 2006); *Rapanos v. United States*, 126 S. Ct. 2208 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 126 S. Ct. 1843 (2006); *Kelo v. City of New London*, 125 S. Ct. 2655 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Commissioner v. Banks*, 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). In addition, *Amicus* served as *amicus curiæ* in the court below. *Giovanella v. Conservation Commission of Ashland*, 447 Mass. 720,

857 N.E.2d 451 (2006).

*Amicus* believes that this case addresses a significant issue in regulatory takings analysis, the determination of the relevant parcel. Property owners and those involved in real estate development are concerned with this issue because legal analysis based on each separate buildable parcel affected by a land-use regulation, and not on all nearby property under common ownership, appropriately focuses regulatory review on the true cost of the regulation to the property owner and treats property investment fairly.

*Amicus Curiæ* therefore believes that this Brief provides an additional perspective, which may aid the Court in determining whether to grant the petition for a writ of *certiorari* of the petitioner, John M. Giovanella ("Giovanella"). Pursuant to Supreme Court Rule 37.2 (b), counsel for *Amicus* has bound a motion for leave to file this Brief together with the Brief, as counsel for Respondent has withheld consent for the filing of this Brief.

## STATEMENT OF THE CASE

*Amicus* adopts the Statement of the Case contained in the Brief of the Petitioner.

## SUMMARY OF ARGUMENT

The approach urged by *Amicus* here, which would focus analysis on the separate parcel affected by the regulation at issue, is supported by the seminal eminent domain analysis of Professor Frank I. Michelman, which has been relied upon by both this Court and other courts throughout the nation, including the court below. Professor Michelman analyzes separate parcels as distinct units when they are separated by geography or local legal distinctions. In this case, the two

adjacent lots owned by Mr. Giovanella had long been subdivided and taxed as separate building lots. Only one of the two lots was restricted by the local wetlands ordinance that rendered that lot unbuildable. Therefore, because the regulation affected only one of the two long-separated lots, the "parcel as a whole" for purposes of regulatory takings analysis should consist solely of the one parcel affected by the ordinance.

## ARGUMENT

### I. The analysis of the impact of an asserted regulatory taking begins with review of independently viable parcels of land recognized as separate under applicable local regulations.

In this Brief, *Amicus* seeks to bring to this Court's attention the need for clarity and uniformity in the "relevant parcel" doctrine as used in regulatory takings analysis under the Takings Clause of the Fifth Amendment to the federal Constitution. In his petition, Mr. Giovanella lays out the divisions among the lower courts in how to determine the "relevant parcel" when the property owner owns property in close vicinity that is treated differently by land-use regulation. Giovanella Petition at 14–20. The court below added to the confusion by creating a new presumption in "relevant parcel" analysis—namely that contiguous, separately taxed and subdivided parcels, such as Mr. Giovanella's, should be presumed to be a single parcel for "relevant parcel" analysis. *Giovanella v. Conservation Commission of Ashland*, 447 Mass. 720, 729, 857 N.E.2d 451, 458 (2006). *See* Giovanella Petition at 7–8.

In order to determine whether impact of a regulation upon property constitutes a regulatory taking, courts review how severely the regulation affects the "relevant parcel."

*Keystone Bituminous Coal Assn. v. DiBenedictis*, 480 U.S. 470, 514–15 (1987) (Rehnquist, J. dissenting). As this Court has recognized, the "relevant parcel" is not easy to determine when a property owner owns distinct legal units of property in the same general vicinity, such as Mr. Giovanella's two adjacent lots in this case. *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001). In such cases, courts first determine the "relevant parcel" by considering the "parcel as a whole" in order to analyze whether a regulatory imposition constitutes a complete regulatory taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), or a partial regulatory taking under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1977).

If a court determines that the regulation's impact may constitute a partial (rather than a total) regulatory taking, the court then performs the three-prong *Penn Central* test. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 131 (1978).[2] The "relevant parcel" is the basis for the courts' examination of *Penn Central*'s "economic impact" prong, a significant aspect of which—the diminution in value test—considers the "takings fraction." The "takings fraction" compares the value of the "relevant parcel" after the imposition of the challenged regulation (the numerator) with the value of the parcel absent the challenged regulation (the denominator). *Palazzolo*, 533 U.S. at 631; *Lucas*, 505 U.S. at 1066. A very substantial diminution in value of the "relevant parcel" is a significant consideration under *Penn Central*'s "economic impact" prong. *See Walcek v. United States*, 49 Fed. Cl. 248, 271–

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2 The three-part *Penn Central* weighing test analyzes: (1) the economic impact of the regulation, (2) investment-backed expectations, and (3) the character of the government's action. *Penn Central*, 438 U.S. at 123–28.

72 (2001), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002). The "relevant parcel" is also the basis for consideration of the property owner's "investment-backed expectations" for that prong of the *Penn Central* takings test. *Penn Central*, 438 U.S. at 130–31 & n.27.

This Court recently acknowledged that "parcel as a whole" analysis, used to determine the "relevant parcel," lacked coherence: "Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, but we have at times expressed discomfort with the logic of this rule, a sentiment echoed by some commentators." *Palazzolo*, 533 U.S. at 631 (citations omitted). Nevertheless, this Court subsequently endorsed "parcel a whole" analysis in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324–35 (2002).

Despite acknowledging the continuing relevance of "parcel as a whole" analysis, this Court has provided minimal guidance as to the meaning of the term, resulting in the significant divisions among the state and federal courts on this issue. *See* Giovanella Petition at 14–20. The Court has, however, indicated that separate legal interests, such as the legally subdivided lots at issue in this case, might warrant separate treatment in "relevant parcel" analysis. *See Lucas*, 505 U.S. at 1016 n.7 ("The answer to [the "relevant parcel" conundrum] may lie in how the owner's reasonable expectations have been shaped by the state's law of property--*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.").

As discussed in greater detail below, *Amicus* submits

that, following the economic principles underlying the *Penn Central* test, the definition of "parcel as a whole" that most closely follows the intent of *Penn Central* treats separately each legally distinct parcel affected by the contested regulation.

## II. The seminal article underlying regulatory takings analysis focuses the "relevant parcel" inquiry on the property affected by the regulation.

Professor Frank I. Michelman, in his seminal article relied on heavily in *Penn Central*, 438 U.S. at 128, indicates that the relevant parcel is "the preexisting value of the *affected* property." *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967) (emphasis added).[3] Discussing the meaning of the "affected property," Michelman makes it clear that courts should focus on the distinct parcel affected by the regulation, even if it is under common ownership and management with adjacent parcels:

> [T]o determine compensability one is expected to focus on the particular 'thing' injuriously

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3 *See Palazzolo*, 533 U.S. at 631 (citing Michelman on "the difficult, persisting question of what is the proper denominator in the takings fraction"); *Lucas*, 505 U.S. 1030 (citing Michelman); *id.* at 1054 (Blackmun, J. dissenting) (citing Michelman on the difficulty of determining the "denominator"); *Keystone Bituminous Coal*, 480 U.S. at 497 (citing Michelman on "the critical question[] of] determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'"); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 199 n.17 (1985) (citing Michelman); *Kirby Forest Indus., Inc. v. United States*, 461 U.S. 1, 14 n.23 (1984) (citing Michelman); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 n.5, 436 (1982) (citing Michelman); *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (citing Michelman for the concept that "the aggregate must be viewed in its entirety").

> affected and to inquire what proportion of its value is destroyed by the measure in question. . . . [I]f we imagine government's practically forbidding me any use of a geographically determined quarter of my farm, it is not likely that the obligation to compensate can be escaped by the argument that only a quarter of the value of the 'thing' has been destroyed.

*Id.*, at 1192–93.[4] *See* Steven J. Eagle, *Regulatory Takings* § 11-

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4 Michelman describes the rationale for treating distinct sections of adjacent property under common ownership as separate "parcels" for regulatory takings purposes:

> The worth of this kind of analysis in a utilitarian compensation program depends on a number of assumptions . . . (1) that one thinks of himself not just as owning a total amount of wealth or income, but also as owning *several discrete "things"* whose destinies he controls; (2) that deprivation of one of these mentally circumscribed things is an event attended by *pain of a specially acute or demoralizing kind*, as compared with what one experiences in response to the different kind of event consisting of a general decline in one's net worth; and (3) that events of the specially painful kind can usually be identified by compensation tribunals with relative ease. . . . The zoned-out apartment house owner no longer has the apartment investment he depended on [and deserves compensation], whereas the nearby land speculator who is unable to show that he has yet formed any specific plans for his vacant land still has a package of possibilities with its value, though lessened, still unspecified--which is what he had before.

Michelman, 80 Harv. L. Rev. at 1234 (emphasis added). *See* Richard A. Epstein, *Takings*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 561, 564 (Peter Newman ed., 1998) (discussing demoralization costs);

7(e)(5), at 813-14 (2d ed. 2001) (landowner could satisfy an objectivity requirement by showing that the asserted property interest taken constitutes a "commercial unit" that is traded in the vicinity, in this case, the separately buildable and taxable lot).

In other words, once property has been legally subdivided by the initial property developer and sold, as was the case with Mr. Giovanella's two lots, the owner has separate expectations as to each individual lot, as each lot is capable of being re-sold and developed independently. At the time that the Ashland wetland ordinance at issue in this case was passed, each lot was a distinct, easily identified unit, with its own clear development expectations. *Giovanella,* 447 Mass. at 722, 857 N.E.2d at 453. Mr. Giovanella's lot that was rendered unbuildable by the local wetland ordinance is similar to the geographically determined quarter of Professor Michelman's hypothetical farm which was a separately identifiable unit before the imposition of the challenged regulation.

Moreover, by analogy to physical takings, "relevant parcel" analysis should treat already subdivided lots differently from larger, undivided parcels. In a physical taking, subdivided lots, even when undeveloped, are valued higher than similar property that has not been subdivided, because each subdivided lot can readily be valued as a separate buildable lot. In Massachusetts, as in most other jurisdictions, under the "lot method" or "developer's residual approach" of valuation a property owner subject to a physical taking can obtain compensation for each lot in a potential subdivision

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James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain,* 69 MINN. L. REV. 1277, 1303 (1985) (similar).

upon proof "that the likelihood of obtaining subdivision approval and zoning relief was 'reasonably probable, rather than merely possible . . . .'" *McLaughlin v. Board of Selectmen of Amherst*, 38 Mass. App. Ct. 162, 172, 646 N.E.2d 418, 424 (1995), *aff'd*, 422 Mass. 359, 365, 664 N.E.2d 786, 790 (1996). *See Algonquin Gas Transmission Co. v. 60 Acres of Land, More or Less, in Brockton*, 855 F. Supp. 449, 453 (D. Mass. 1994); *Clifford v. Algonquin Gas Transmission Co.*, 413 Mass. 809, 820–21, 604 N.E.2d 697, 703–04 (1994). *See also United States v. 100 Acres of Land, More or Less, in Marin County*, 468 F.2d 1261, 1266–67 (9th Cir.), *cert. denied*, 414 U.S. 864 (1972); *United States v. 147.47 Acres of Land in Monroe County*, 352 F. Supp. 1055, 1059–60 (M.D. Pa. 1972); 4 JULIUS L. SACKMAN, *NICHOLS ON EMINENT DOMAIN* § 12B.14[1] at 12B-157–58, 159 (3d ed. 2006) ("When the land has actually been subdivided the evidence is admissible, bearing directly on the highest and best use and potential use is no longer remote or speculative." "Determining the market value presents little problem where the land has actually been subdivided. In that case, there being little speculation as to use, the lots may be valued individually."). *See NICHOLS ON EMINENT DOMAIN* § 12B.14[1] at 12B-177–81 (discussing "lot method").

In this case, the lots in question had long been independently buildable, separately taxed, subdivided lots. *Giovanella*, 447 Mass. at 722, 857 N.E.2d at 453. Only the passage of the Ashland wetland ordinance after Mr. Giovanella's purchase of the lots rendered the unbuilt lot unbuildable. *Id.*, 447 Mass. at 723–24, 857 N.E.2d at 454–55. Had Mr. Giovanella's property been taken by a physical taking, rather than a regulatory taking, each lot would have been treated separately under the "lot method" of appraisal. By analogy, a similar conceptual analysis in the regulatory taking

context is fair and reasonable.

*Amicus* notes that the Ohio Supreme Court recently decided that only those portions of a large area under common ownership that were affected by a regulation were to be considered as the "relevant parcel." *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St. 3d 1, 11-12, 780 N.E.2d 998, 1008-09 (2002) ("*R.T.G.*"). In that case, the property owner was a mining company that owned both mining rights and surface fee rights in a large area, only some of which was covered by the new regulation prohibiting surface mining. In Ohio, as in a number of states, mining rights constitute a separate legal estate from the surface fee, each capable of independent sale. The court held that the relevant parcel was the mining estate within the "unsuitable for mining" designation, which constituted just about half of the total acreage under common ownership. *Id.*, 98 Ohio St. 3d at 12, 780 N.E.2d at 1009. Just as with Mr. Giovanella's two lots prior to the passage of the Ashland wetland ordinance, in *R.T.G.* the separate parts of the *R.T.G.* contiguously owned property—the surface and mining estates—were severable and of value in their own right prior to the imposition of the "unsuitable for mining" designation. *Id.*, 98 Ohio St. 3d at 11, 780 N.E. 2d at 1009.

The Idaho Supreme Court recently reached a similar conclusion in *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 136 P.3d 310, 319-21 (2006) (remanding for reconsideration of appropriate denominator; separate ownership of adjacent parcels previously under common control began inquiry, but parcels would be considered together if municipality could show on remand that separation of parcels was "accomplished for the purpose of creating an advantageous denominator"). The court treated upland and beachfront parcels (three

separate tax lots) separately when only the beachfront parcels were subject to the prohibition on building within 40 feet of the shoreline. *Id.*, 136 P.3d at 313-14. The court took this approach even though the parcels shared the same street address (unlike Mr. Giovanella's lots in this case, *Giovanella,* 447 Mass. at 722, 857 N.E.2d at 453), and even though the sale that separated ownership of the two properties (which occurred after the land-use dispute, as in this case) was an insider sale to a corporation wholly owned by the children of the original owners, unlike the arms' length sale of the unbuilt lot in this case. *Compare City of Coeur d'Alene,* 136 P.3d at 313-14, 319-20, *with Giovanella,* 447 Mass. at 723, 857 N.E.2d at 454.

As described in detail by Mr. Giovanella, a number of courts (including the court below) have strayed from the original meaning of the "parcel as a whole" concept as developed by Professor Michelman in his seminal article, by including virtually any land in the vicinity under common ownership, regardless of the regulatory effects on each separate unit of land. *See* Giovanela Petition at 15–20. *Amicus* therefore urges that this Court grant *certiorari* to clarify the meaning of "parcel as whole" in regulatory takings analysis as applied to separate units of property held under common ownership.

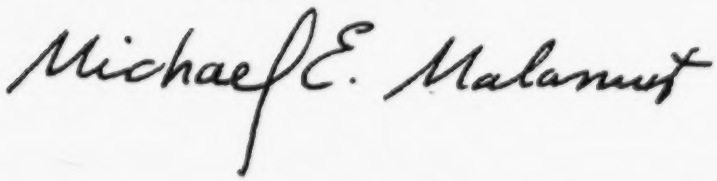
## CONCLUSION

For the reasons stated above, this Court should grant Mr. Giovanella's Petition for a writ of *certiorari*.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION

By its attorneys,



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